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No. 83-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GRAND JEWELS, INC.,

Petitioner,

—v.—

MONTRES ROLEX, S.A., DENNIS SNYDER, Regional Commissioner, U.S. Customs Service and UNITED STATES CUSTOMS SERVICE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Grand Jewels, Inc.
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-v.-

Montres Rolex, S.A.,*
Dennis Snyder, Regional Commissioner,
U.S. Customs Service and
United States Customs Service,
Respondents.

RESPONDENT MONTRES ROLEX S.A.'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The principal Question set forth in the Petition for Certiorari is the so-called unconstitutional vagueness of the pertinent statutes (19 U.S.C. 1526, 15 U.S.C. 1127).

*Montres Rolex S.A. and any parent subsidiary or affiliate are not publicly held.

Not only is this argument totally lacking in merit, it was neither raised nor considered below. Hence it is not properly before this Court. Petitioner's other Questions are equally without merit.

ARGUMENT

I. Unconstitutional Vagueness Was Not Raised or Considered Below and No Exceptional Circumstances Exist for Supreme Court Review

The argument of unconstitutional vagueness was not raised by petitioner before Customs, or the District Court, or the Court of Appeals. This argument, coming for the first time after two lower court decisions ordering the forfeiture of petitioner's counterfeit goods, is a transparent attempt to fabricate an issue where none exists.

Surely, if the pertinent statutes (19 U.S.C. 1526, 15 U.S.C. 1127) were vague, i.e. if they did not give sufficient warning of the proscribed conduct, this claim would have been immediately apparent and pressed at the outset. But neither petitioner, Grand Jewels, nor the U.S. Customs Service, represented by the U.S. Attorney's Office, raised this claim below. Moreover, the U.S. Customs Service, the agency charged with responsibility for applying the statutes in question, has opposed the Petition. (See Memorandum of Federal Respondents in Opposition, arguing that the claim of unconstitutional vagueness is not properly before this Court and is without merit).

The Supreme Court has consistently refused to review questions which were not considered by the court below. Lawn v. United States, 355 U.S. 339, 362 n.16

(1958); Adickes v. S. H. Kress Company, 398 U.S. 144, 147 n.2 (1970) and Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 (1976).

> "As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below - irrespective of its general significance or novelty. 13 Moore's Federal Practice ¶817.41 (1983).

To permit review of this claim, raised here for the first time, would be unfair and contrary to the orderly administration of justice. As one court has phrased it, to allow review of a question not pressed or passed on below:

> "...would open wide the door to trickery, imposition, and unfair harassment of litigants and courts...." Atlantic Brewing Co., Inc. v. William J. Brennan Grocery Co., 79 F.2d 45, 47 (8th Cir. 1935) following the Supreme Court decision in Duigan v. United States, 274 U.S. 195, 200 (1972).

It is just to prevent unfairness and harassment and to give valid issues the

benefit of the lower court's analysis that the Supreme Court declines to review issues not raised below. Ibid.

This Petition is a perfect example of the unfairness, harassment and burden on judicial review that this well-accepted rule is intended to prevent.

The failure to raise the claim of unconstitutional vagueness below cannot be explained or justified by exceptional circumstances.*

The invention of a so-called "constitutional" issue at this late stage

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* Examples of exceptions which might justify departure from the rule include lack of jurisdiction in the lower court or significant change in the law after the decision below. R. Stern & E. Gressman, Supreme Court Practice §6.27 (5th ed. 1978). Neither these exceptional circumstances nor any others exist in this case.

can only be explained as a ruse to delay forfeiture of petitioner's counterfeit goods as ordered by the Judgment below.

II. The Pertinent Statutes Are Not Unconstitutionally Vague

The claim of unconstitutional vagueness was not made below for good reason--there simply is nothing the least bit vague about the statutes in question.

The standard for unconstitutional vagueness as to non-criminal statutes is set forth in petitioner's Brief as follows:

> "whether the language of the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Petitioner's Brief pp. 18-19 citing Jordan v. De George, 341 U.S. 223 (1951).

The proscribed conduct involved in the case at bar is the importation of goods bearing a counterfeit mark. The

term counterfeit is defined under 19 U.S.C. 1526 by reference to Section 45 of the Lanham Act (15 U.S.C. 1127) as:

> "A 'counterfeit' is a spurious mark which is identical with, or substantially indistinguishable from, a registered trademark."

Petitioner has not pointed to anything vague about the terminology of this definition and indeed it is not vague.

Similarly, petitioner has not specified anything vague and there is nothing vague about the forfeiture penalty which is provided for imported goods bearing a counterfeit mark. See 19 U.S.C. 1526(e).

What petitioner has framed as an issue of unconstitutional statutory vagueness is really no more than an objection to the legal standard used by the Courts below in determining "counterfeit." The Courts below held

that Customs was in error when it judged whether the marks were "substantially indistinguishable" from the viewpoint of the expert (using a jeweler's loupe), rather than from the viewpoint of the average purchaser. The holding of the District Court and the Court of Appeals that the average purchaser standard must be applied is consistent with decades of case law. Both before and after the enactment of the 1946 Lanham Act, the question of trademark infringement has uniformly been judged from the standpoint of the average purchaser.

There is no reason to expect that a different standard should be applied in judging the issue of counterfeit (a type of infringement) under the Lanham Act. Indeed, to determine counterfeit from the standpoint of expert microscopic examination flies in the face of the very

purpose of the Act--to protect the consuming public (not just experts) from deception. See Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 854 n.14 (1982) and U.S. Code Congressional Service, 79th Cong., 2d Sess. 1274-1275 (1946).

The fact that Customs erroneously determined counterfeit from the standpoint of expert microscopic comparison does not infect the pertinent statutes with unconstitutional vagueness. Customs simply made a mistake of law. Administrative bodies can and do commit errors of law which, as in this case, do not in any sense call into question the constitutionality of the pertinent statutory scheme.

III. Petitioner's Other Questions Do Not Merit Review

Petitioner devoted all but the last

two paragraphs of its Brief to the belated claim of unconstitutional vagueness (Question 1 of the Petition).

Questions 2, 3 and 4 of the Petition are mentioned only in passing on the last page of petitioner's Brief. These issues were thoroughly addressed and correctly determined below. Petitioner has not specified error of any kind, much less error of the kind calling for review by this Court.

CONCLUSION

The Petition for Writ of Certiorari is without merit and should be denied.

Respectfully Submitted,

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